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Supreme Court of the United States

October Term, 1998

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO), PETITIONER

v.

GARY LOCKE, Governor of the State of Washington; CHRISTINE O. GREGORIE, Attorney General of the State of Washington; BARBARA J. HERMAN, Administrator of the State of Washington Office of Marine Safety; DAVID MACEACHERN, Prosecutor of Whatcom County; K. CARL LONG, Prosecutor of Skagit County; JAMES H. KRIDER, Prosecutor of Snohomish County; NORMAN MALENG, Prosecutor of King County; NATURAL RESOURCES DEFENSE COUNCIL; WASHINGTON ENVIRONMENTAL COUNCIL and OCEAN ADVOCATES, Respondents

UNITED STATES OF AMERICA, PETITIONER

v.

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMICUS BRIEF BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES IN SUPPORT OF PETITION'S INTERTANKO AND UNITED STATES

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UNITED STATES OF AMERICA, PETITIONER

v.

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, ET AL.

BRIEF OF MARITIME LAW ASSOCIATION OF THE UNITED STATES, *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR CERTIORARI[1]

The Maritime Law Association of the United States (hereinafter "MLA") respectfully submits this brief as *amicus curiae* in support of the Petitions for Writ of Certiorari filed by the United States of America and the International Association of Independent Tanker Owners.[2]

INTEREST OF AMICUS CURIAE

The MLA is a nationwide bar association founded in 1899, with a membership of about 3,600 attorneys, law professors and others interested in maritime law. Its attorney members, most of whom are specialists in admiralty law, represent all maritime interests, including shipowners, charterers, cargo interests, port authorities, seaman, longshoremen, passengers, underwriters, and other maritime claimants and defendants.

The purposes of the MLA are stated in its Articles of Association:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and enforcement, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comté Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

[1]This Brief was authored by James Patrick Cooney, attorney for the Maritime Law Association of the United States, and Howard M. McCormack, President of the Maritime Law Association of the United States. No person or entity other than the Maritime Law Association made a monetary contribution to the preparation or submission of the Brief.

[2]The MLA has received and filed the written consent of Governor Gary Locke and the other state respondents in both Nos. 98-1701 and 98-1706 and the written consent of the International Association of Independent Tanker Owners, the Petitioner in in No. 98-1706. The MLA has requested, but has not received written consent from the United States and requests that this Brief also be considered a Motion for Leave to File an Amicus Brief in No. 98-1701.

In furtherance of these objectives, the MLA has sponsored a wide-range of legislation dealing with maritime matters during its 100 years of existence, including the Carriage of Goods by Sea Act,[3] the Federal Arbitration Act,[4] and the Foreign Sovereign Immunities Act.[5] The MLA has also cooperated with congressional committees in the formulation of other maritime legislation.[6]

The MLA assists in maritime projects undertaken by agencies of the United Nations, and works closely with the International Maritime Organization (IMO).

The MLA is one of some 57 national maritime law associations constituting the Comté Maritime International,[7] seeking international uniformity in maritime laws through international conventions.

Uniformity in maritime law, both national and international, prompted the adoption in 1975 by the MLA of a Resolution which states:

> RESOLVED, that the Maritime Law Association of the United States considers it of the utmost importance and in the public

[3]46 U.S.C.§§1300-1315.

[4]9 U.S.C. §§1-5.

[5]28 U.S.C. §§ 1330, 1602-1611.

[6] E.g., Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§1251-1376; Convention of the International Regulations to Prevent Collisions at Sea, 28 U.S.T. 3459, *as amended*, T.I.A.S. 10672; United States Inland Navigation Rules, 33 U.S.C. §§2001-2073.

[7]These now include Argentina, Australia and New Zealand, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Croatia, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, Finland, France, Germany, Greece, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, D.P. R. Korea, Malaysia, Malta, Mauritanie, Mexico, Morocco, Netherlands, Nigeria, Norway, Panama, Peru, Philippines, Poland, Portugal, Senegal, Singapore, Slovenija, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Turkey, United Kingdom, United States, Uruguay, Russia, Venezuela and Yugoslavia.

interest that maritime law be uniform to the maximum extent possible throughout the United States. In 1986, the MLA reaffirmed the policy by the following Resolution:

> Now, therefore, this Association reaffirms its support of the importance of maintaining national uniformity in maritime law and approves action, subject to the By-Laws, to express such support, including filing amicus briefs and supporting proposed legislation or other action which favors uniformity in maritime law, and opposing proposed legislation or other action with impairs uniformity in maritime law.

In furtherance of its policy on uniformity, the MLA has appeared before this Court as *amicus curiae* on numerous occasions to argue in favor of the principle of uniformity in the substance and application of the Maritime Law of the United States.[8]

SUMMARY OF ARGUMENT

1. The decision of the Ninth Circuit in *Intertanko vs. Locke* poses a significant threat to the ability of the United States to uniformly and consistently regulate the operation of merchant vessels calling at American ports and to effectuate any coherent national policy consistent with its international treaty obligations directed to the safe operation of such vessels and the protections of the environment. A Writ of Certiorari should be granted in this case to allow this Court to settle the significant issues raised regarding the

[8] *E.g.* *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970); *Askew v. American Waterways Operators*, 411 U.S. 325 (1973); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Air Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Chick Kam Choo v. Exxon Corporation, 486* U.S. 140 (1989); *Sisson v. Ruby, 497 U.S. 358 (1990); American Dredging Co. v. Miller*, 510 U.S. 443 (1994); *Yamaha Motor Corp., U.S.A. v. Calhoun*, 515 U.S. 1186 (1996); *Exxon Co., U.S.A. v Sofec, Inc.*,516 U.S. 1091 (1996); *Bouchard Transp. Co., Inc. v. U.S.*,U.S., 119 S.Ct. 1095 (Mem.) (1999).

balance to be achieved among the competing state, federal and international interests regarding the regulation of vessel safety and operations.

2. The decision below is fundamentally flawed so that review by this Court is required. It then holds that OPA90 best reveals the overarching purpose of Congress in regulating vessel safety so that the state statutes directed to the prevention of marine pollution cannot be preempted by federal regulation.[9] It then holds that OPA90 best reveals the overarching purpose of Congress in regulating vessel safety so that directed to the prevention of marine pollution cannot be preempted by federal regulation.
3. The decision ignores the preemptive effect of federal regulation in the area of maritime safety as recognized in *Ray vs. Atlantic Richfield Co.*[10] and the preemptive effect of international conventions dealing with vessel safety to which the United States is a party.

ARGUMENT

I. The *Intertanko* Decision[11] Poses a Significant Threat to the Ability of the United States to Uniformly and Consistently Regulate the Operation of Merchant Vessels

From the earliest days of our nation, courts, legislatures and scholars have recognized that the regulation of waterborne commerce between the States and with foreign counties demands a uniform and consistent approach and, therefore, is an area to be dealt with primarily at the federal level.[12] More recently, the United States has opted to participate in international efforts through the International Maritime Organization (IMO) to develop, implement and

[9] 33 U.S.C. § 1018.

[10] 435 U.S. 151 (1978)

[11] *Int'l Assoc. of Indep. Tanker Owners v. Locke*,148 F.3d 1053 (9th Cir. 1998), *reh. denied*, 159 F.3d 1220 (9th Cir. 1998) (hereafter "*Intertanko*")

[12] *See, e.g.*, The Federalist, No. 11,(Hamilton); *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386 (1923).

enforce an effective mandatory international legal regime designed to promote merchant vessel safety and prevent marine pollution by vessels.[13] It has also become party to numerous international conventions and other agreements establishing comprehensive rules and standards for merchant vessels. These rules and standards have been adopted by our domestic laws, so that vessels meeting international standards are also in compliance with our national vessel requirements and on that basis are allowed to enter our ports.[14]

The statutes and regulations of the State of Washington which are at issue in this case[15] attempt to impose standards regarding vessel safety and the prevention of pollution that differ from both the federal and international standards. In *Intertanko*, the Ninth Circuit has held that the Washington State statute and regulations were not preempted by either federal law or by international convention. If the Ninth Circuit decision is allowed to stand, the ability of the national government, and the United States Coast Guard in particular, to effectively regulate the operation of tankers and other vessels calling on the ports of this nation will be significantly eroded. The way will be left open to the States and their political subdivisions[16] to effectively displace the federal government in its role as the principal regulator of our

[13]For a listing of the International convention implicated, see. Petition of United States of America for writ of Certiorari in no. 98-1701: See, Craig H. Allen, *Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States (Part II)*, 29 J. Mar.L.& Com. 565 (1998) (Allen Part II)

[14]*See, e.g.*, 46 U.S.C. §§3710(a) and 3711(a).

[15]Oil and Hazardous Substances Spill Prevention and Response Act, 1991 Wash. Laws ch. 200 Wash. Rev. Code ch. 88.46.010 *et seq.*; Wash. Admin. Code §§317-21-010 *et seq.*

[16]It should be noted that the statutory provision upon which the Ninth Circuit's preemption analysis is based, Section. 1018 of OPA90, preserves the authority of States and *their political subdivisions* to impose requirements with respect to the discharge of oil. 33 U.S.C. §2718b. Arguably, the decision for which review is being sought allows not only the states, but state port authorities, municipalities and other political subdivisions to regulate vessel operations concurrently with the federal government.

maritime commerce.

This possible displacement of the federal government as the principal regulator of maritime commerce is made all the more troublesome when considered in the context of the growing body of international law dealing with safety at sea generally and the prevention of pollution in particular, since it is this body of international law that forms the basis of the federal government's approach to vessel regulation. If, indeed, statutory efforts of a state to regulate the operation of tankers and other ocean going vessels cannot be preempted by treaty or by federal statutes and regulation, the stage will be set for the balkanization of vessel regulation in the United States and the collapse of the current approach of our federal government to achieve vessel safety through a mandatory international legal regime. Efforts to provide uniform rules and regulations consistent with the various international conventions regarding safety at sea and various other maritime issues to which the United States is a signatory will be frustrated and international treaties and federal statutes and regulations will be relegated to the status of "minimum standards," [17] to be augmented by the states and local regulation. Any sense of uniformity in the area of maritime regulation will be lost and a patch work of local standards will come into existence, creating "precisely the sort of Balkanization of interstate commercial activity that the Constitution was intended to prevent."[18]

It is this threat to the uniformity of the maritime law of the United States that constrains the MLA to appear before this Court as *amicus curiae* to urge that the Petitions for Writ of Certiorari filed by the International Association of Independent Tanker Owners and the United States be granted and that the decision of the Court of Appeals in this case be reversed. The very nature of maritime commerce demands that its regulation be uniform and consistent. It goes without saying that the United States is the principal maritime trading nation of the world. At the same time, our own merchant marine has been substantially reduced so that we

[17] *See Intertanko*, 148 F.3d 1053, 1063.

[18]*Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 286 (1977).

are dependent to a great extend on foreign vessels to transport goods to and from our shores. To encourage and facilitate our ocean borne commerce, to provide for the safe operation of vessels coming to our shores and to meet our international treaty obligations, uniform and consistent national standards are necessary. For these reasons, the primary responsibility for the regulation of vessel operation and safety must be left to the federal government. The state statute at issue here encroaches and overlaps into an area that must remain preemptively federal and to that extent should be preempted by federal law and regulations under the Supremacy Clause of the U.S. Constitution.[19]

At the heart of this matter is the heightened awareness of and concern for the environment resulting from several significant and well-publicized oil spills resulting from vessel casualties, the most notable being the Exxon Valdez spill in 1989 which lead to the passage of the *OPA90* and the Washington statute here at issue. The policy determination made by the Congress to allow the states and their political subdivisions a role in the area of environmental regulation raises the question of how to reconcile the interests of the several states to protect their environments with the need for uniform and consistent regulation of maritime commerce.

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[19]The Constitutional basis of the preemptive federal role in the regulation of maritime commerce is clear. Article I, Section 8, Clause 3 (The Commerce Clause) states: "The Congress shall have power * * * to regulate commerce with foreign nations, and among the several states. Article I, Section 8, Clause 18 (The Necessary and Proper Clause) states that "The Congress shall have power * * * To make all laws which shall be necessary and proper for the carrying into Execution the foregoing Powers * * *. " Article III, Section 2, Clause 3 (The Admiralty Clause) states:"The judicial power shall extend * * * To all cases of admiralty and maritime jurisdiction." It is now firmly recognized that these provisions empower Congress to make maritime law. *See Panama, supra*, note 129. *Cf. Miles v. Apex Marine Corp.*,498 U.S. 19, 36 (1990) , noting that "Maritime tort law is now dominated by federal statute. . ." Article VI, Section 2, (The Supremacy Clause) makes federal maritime law binding on the states: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

There is no question that the States have the inherent right under their police power to prohibit the discharge of pollutants into the environment within their boundaries, to establish standards regarding the response and abatement of such a discharge, and to impose civil and criminal liabilities to deter such harm to the environment. Implicit in this right to prohibit pollution is the interest of the states in the implementation of laws and regulations aimed at the prevention of pollution within their borders. In the maritime context, however, the environmental interests of the States must be balanced against the federal responsibility to provide for the uniform and consistent regulation of maritime commerce.

As is the case here, the effort of the State of Washington to protect its waters and shores from oil pollution brings it into direct conflict with the efforts of the federal government to address identical and related concerns on a national and international level. Washington has issued broad and comprehensive regulations establishing standards in the areas of incident reporting, watch keeping and lookout practices, bridge resource management, navigational practices, engineering practices, testing of engineering, navigational and propulsion systems, emergency procedures, record keeping, personnel training, drug and alcohol testing, personnel job performance evaluation, work hours, language proficiency, and management practices. All of these regulations are for the stated purpose of preventing pollution. The decision below has upheld the right of the State of Washington to regulate these areas of vessel activity notwithstanding the fact that these areas are dealt with comprehensively by federal statute and international convention. Vessels that call in ports of the State of Washington must comply not only with the standards and requirements imposed by federal regulation, but also the additional and differing standards and requirements of the State of Washington.[20]

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[20]Unfortunately, the problem is not restricted to vessel actually calling on ports within the State of Washington, since the Washington

(continued...)

If the decision below is allowed to stand, the legal framework on which we regulate our maritime commerce will become fragmented, uncertain, and unnecessarily contentious.[21] The question of whether this dual state-federal regulation of vessel operations in the United States is constitutionally permissible is one of overwhelming concern to the maritime industry and should be addressed by this Court now, without waiting for action by other States or further parallel developments in the lower courts.

II. The Decision Below Is Fundamentally Flawed so that Review by this Court is Required.

A. The Regulatory Overlap.

At issue in this case is a statute of the State of Washington directed to the protection of state waters from oil pollution by oil tankers and regulations of the State of Washington issued pursuant thereto dealing with, *inter alia,* event reporting, operating procedures and watch practices, navigational practices, engineering practices, crew training, crew work hours, language requirements, and record keeping. The same areas are dealt with by OPA90, the Ports and Waterways Safety Act (PWSA),[22] a comprehensive body of regulations issued by the United States Coast Guard pursuant to these statutes, [23] and a number of international treaties and conventions dealing with maritime safety and the environment.[24] The PWSA contains two titles. Title I is codified at Sections 1221-1227 of Title 33 U.S.C.and authorizes

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(...continued)

statute would apply to vessels required to pass through state waters en route to ports in Canada, implicating our treaty obligations with Canada and the right of innocent passage generally.

[21]As noted the Petition of the United States of America in No. 98-1701 at 26 , many nations have protested the Washington state regulations.

[22]Pub. L. No. 92-340, 86 Stat. 424 (1972).

[23]*E.g.*, 58 Fed. Reg. 27,268 (1993) (regulating watch keeping practices); 60 Fed Reg. 24,767, 24, 771 (1995) (regulating steering gear); 58 Fed. Reg. 68,274, 68,277 (1993) (regulating drug testing)

[24]*See* Petition of United States for Writ of Certiorari in No. 98-1701, at 3.

the establishment of vessel traffic control systems, the restriction of the operations of tankers not having specified capabilities and the negotiation of international treaties on vessel safety. Title II is codified in Title 46 of the U.S. Code and requires the Secretary of Transportation to adopt uniform federal regulations for tanker design, construction, equipment, and operation,[25] and delegates the Secretary's obligations to issue regulations to the U.S. Coast Guard.[26] The PWSA was supplemented in 1978 by the Port and Tanker Safety Act (PTSA),[27] which requires the Secretary of Transportation to establish regulations dealing with vessel management, drug and alcohol testing, seafarer training and qualifications, casualty reporting, seafarer discipline, manning, work hours, pilotage, and language proficiency requirements.

Finally, OPA90 imposes several requirements including a provision for random drug and alcohol testing,[28] limited working hours for tanker crews,[29] and a requirement that tankers be equipped with double hulls.[30]

B. The Decision Below.

The Ninth Circuit held in *Intertanko* that the Washington statute and regulations dealing with vessel operation and management are not preempted by OPA90, PWSA, PTSA, or by any relevant international treaty or convention. In so holding, the Court relied on section 1018 of OPA90[31], which provides that "nothing in this Act . . . shall affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability, or requirements with respect to . . . the discharge of oil or the pollution by oil within such State," or that "the authority of the United States or any State or political subdivision thereof . . . to impose additional liability or additional requirements . . . relating to the

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[25]46 U.S. C. §3703.
[26]46 U.S.C. §2104.
[27]46 U.S.C. §§ 9101, 9102.
[28]46 U.S.C. §7702.
[29]46 U.S.C. §8104(n).
[30]46 U.S.C. § 3703a.
[31]33 U.S.C. §2718(a).

discharge, or substantial threat of a discharge of oil." The Court assumed without discussion that the state regulations dealing with vessel operations constituted "oil spill prevention requirements" and that such regulations were "with respect to" or "related to" the discharge of oil and thus could not be preempted by anything contained in OPA90.

In concluding that neither the PWSA nor the PTSA preempted the Washington State statute and regulations, the Ninth Circuit held:

> In the field of tanker regulation, the overarching purposes of Congress are best revealed by OPA90. As the most recent federal statute in the field, OPA90 reflects "the full purposes and objectives of Congress." (Citing *Hines vs. Davidowitz*, 312 U.S. 52, 67 (1941)), better than the PWSA, the PTSA or the Tank Vessel Act, all of which OPA90 was designed to complement.[32]

The Court went on to hold:

> Section 1018 of OPA90 sheds considerable light upon the purposes and objective of Congress in effectuating a federal scheme of tanker regulation. That provision demonstrates Congress's willingness to permit state efforts in the areas of oil-spill prevention, removal, liability and compensation.[33]

Under the reasoning utilized by the court below, the state regulation of vessel operations is principally directed to the prevention of oil spills, which is "in respect to" the discharge of oil and as such the state regulation of vessel operation cannot be preempted under section 1018 of OPA90. OPA90 is presumed to be the definite expression of Congressional purpose and objective in the area of vessel regulation, so that the saving effect of Section 1018 is extended to all federal statutes dealing with vessel regulation.

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[32] *Intertanko, supra*, 148 F.3d at 1062.

[33] *Id.* at 1062.

Following this line of reasoning, the court concludes that if the federal statutes upon which the federal regulation of vessels is based cannot preempt state statutory efforts in the same area, the Coast Guard regulations issued pursuant to such statutes cannot preempt state regulation either.

The Ninth Circuit also holds that the Washington regulations are not preempted by several conflicting international treaties, including the International Convention for the Safety of Life at Sea, the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, the Multilateral International Regulations for Preventing Collisions at Sea, the Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region, and the United Nations Convention on the Law of the Sea,[34] relying on its decision in *Chevron U.S.A., Inc. v. Hammond*,[35] which held:

> [T]he PWSA/PTSA does not mandate strict international uniformity. Although the legislative history of the PWSA/PTSA refers to congressional intent to abide by international agreements regarding the regulation of tankers, the statutes nonetheless give the Coast Guard specific authority to establish stricter requirements than those set by international agreements. *This indicates Congress' view that the international agreements set only minimum standards, that strict international uniformity was unnecessary, and that standards stricter than the international minimums could be desirable in waters subject to federal jurisdiction.*[36]

C. The Preemption Analysis Followed in *Intertanko* is Flawed.

1. Section 1018 of OPA90 does not save state vessel

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[34] *supra*, note 6,

[35] 726 F.2d 483, (9th Cir. 1984) *cert. denied sub nom., Chevron U.S. A., Inc. V. Sheffield*, 471 U.S. 1140, 1985 AMC 2395 (1985).

[36] *Id.*, at 493-94 (emphasis in original).

regulations from federal preemption.

The key component of the preemption analysis utilized below is the broad construction placed on section 1018 of OPA 90. The construction would seem to protect from preemption any state vessel regulation that might contribute to the prevention of vessel pollution in the broadest sense. The construction cannot be sustained. First, there is no authority either in the legislative history or the case law to support the broad construction placed on section 1018. The language of section 1018 is substantially identical to the saving clauses in the Clean Water Act,[37] the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),[38] the Trans-Alaska Pipeline Authorization Act (TAPPA),[39] and the Deepwater Port Act.[40] The language has never been construed to provide protection from preemption beyond state liability and removal activities.[41] A consideration of the legislative history of OPA90 also creates serious doubt that there was ever any intent on the part of Congress to extend its effect to pollution prevention regulation or even to the entirety of the consolidation of various legislative initiatives into what eventually became OPA90.[42]

Second, for the Ninth Circuit's preemption analysis to work, it must be accepted that the primary purpose of the regulation of vessel operations and vessel safety is oil spill prevention. Oil spill prevention, however, is only a subset of the many purposes to which the regulation of vessel operations and vessel safety is directed. For instance, regulations directed to the prevention of vessel collision may be seen as

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[37]33 U.S.C. §1321(o)(2).

[38]42 U.S.C. §9614(a).

[39]43 U.S.C.§1656(c)(1).

[40]33 U.S.C. §1517(k).

[41]*See, e.g. Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973); *Steuart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609 (4th Cir 1979); Craig H.Allen, *Federalism in the Ear of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States (Part III)*, 30 J. Mar.L.& Com. 85, 124 (1999).

[42] *See generally, Intertanko* , 159 F.3d 1220 (9th Cir.1998) (Graber, CJ, dissenting).

directed to the prevention of oil spills since collisions may result in oil spills. Such regulations, however, are more realistically seen as regulations directed to the prevention of the several consequences that may result from a collision including loss of life, personal injury, damage to property, as well as damage to the environment. In the real world, the prevention of oil spills or environmental damage is only one, and perhaps not the primary, purpose behind the regulation of vessel operations. It would seem that the need to protect human life and safety must be recognized as primary. The federal regulation of vessel operations is not directed exclusively to the prevention of oil spills and transcends the limited purposes and objectives the Court below implicitedly assigned to it.

Finally, there is nothing to suggest that section 1018 of OPA90 was intended to relieve the states of the preemptive effect of international treaties dealing with marine safety or pollution prevention.[43]

2. OPA90 does not best reveal the overarching purpose of Congress in the field of tanker regulation.

Instead of separately treating each of the several federal statutes dealing with vessel safety to determine their preemptive effect on conflicting state regulation, the Court below assumed without analysis or authority that since OPA90 was the most recent federal statute in the field, it reflected "the full purpose and objectives of Congress" better than prior legislation in the field.[44] By doing so, the court reaffirmed the underlying assumption of the decisions that the primary purpose of vessel regulation is the prevention of pollution. Going one step further, the court applied its expansive construction of section 1018 of OPA90 to the entire field of tanker regulation and concluded that section 1018 was a key to the determination of the principal purposes and objectives of Congress in effectuating a federal scheme of tanker regulation and demonstrated "Congress's

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[43]Allen, surpa, note 41, at 132.

[44]*Intertanko, supra, 148 F.3d* at 1062, citing Hines v. Davidowitz, 312 U.S 52, 67(1941).

willingness to permit state efforts in the areas of oil-spill prevention."[45] The approach taken by the Ninth Circuit is logically unsupportable. It totally disregards the strategy that has been followed by the federal government in joining in a mandatory international vessel regulation regime that is implemented domestically through statute and Coast Guard regulation. The purposes and objectives of the PWSA and the PTSA must be considered apart from Congress' purpose and objective in enacting OPA90 or even the Congressional purpose and objective in enacting the portions of OPA90 dealing with pollution prevention. There is every indication that in affirmatively directing the Secretary and the Coast Guard to issue definitive regulations regarding vessel safety and spill prevention in the PWSA/ PTSA, and Title IV of OPA90, it was not the purpose or objective of Congress to permit the states to enter the field of vessel regulation. To the contrary, the clear implication is that Congress intended for there to be a uniform national approach to vessel regulation consistent with the international treaties and conventions dealing with the various aspects of vessel operation, safety, and pollution prevention to which the United States is a party. The Ninth Circuit's failure to focus on the totality of the regulatory approach of the United States to vessel safety and pollution prevention is fatal to its conflict preemption analysis. A proper analysis can lead to no other conclusion but that the statutory and regulatory approach taken by the federal government in this area requires the preemption of state regulation.

3. Preemptive Effect of International Treaties.

The United States is a party to numerous conventions dealing with vessel safety matters, including SOLAS, MARPOL, and STCW, that expressly prohibit the parties to the conventions from imposing stricter standards on foreign flag vessels calling in domestic ports.[46] These conventions seek

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[45] *Intertanko, supra, 148 F.3d* at 1062.

[46] *See, e.g.*, SOLAS, Part II, note 420, art. VI(d), which provides: "All matters which are not expressly provided for in the present Convention remain

(continued...)

to mandate compliance with specific standards regarding the vessel design, construction, maintenance, manning, personnel training, and management of vessels imposed by the vessel's flag state (nation), in exchange for assurance by the port state (nation) that compliance with the mandatory international standards will be sufficient for vessels to gain entry to the waters and ports of the port state.[47] If this international vessel regulatory regime is to function in our federal system, conventions entered into by the United States must be accorded preemptive effect over state regulatory efforts seeking to augment or strengthen the convention requirements, no matter how desirable or benign the state regulations may appear.

The court below gave no consideration to how the purposes and objectives of the relevant international conventions affect the ability of the states to impose vessel regulations. Instead, it gave global effect to its holding in *Chevron U.S.A., Inc. vs. Hammond*[48] that treaties can only create minimum standards and that strict uniformity is not required by international treaties. Having already concluded that all of the relevant congressional purposes and objective of tanker regulation were embodied in OPA90, and that nothing in OPA90 would be frustrated by the Washington State regulations, the court found it unnecessary to consider any legislative or foreign policy objectives that Congress and the President may have sought to obtain through the various conventions and treaties to which the United States is a party that impact the regulation vessel safety. In so doing the Court cut short the conflict inquiry in the preemption analysis by which it must determine whether the state law stands as an obstacle to the accomplishment and execution of the "full

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(...continued)

subject to the legislation of the Contracting Governments."

[47] *See* Craig H. Allen, *Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States (Part II)*, 29 J. Mar.I., & Com. 565, 565-575 (1998)

[48] *supra*, note 34.

purposes and objective of Congress."[49] Had the proper analysis been carried out, there can be little doubt that the Court would have found the Washington statute and regulations preempted by the various international conventions that impact the field of vessel regulation. [50]

4. The Preemptive Effect of Coast Guard Regulations.

The Ninth Circuit points to this Court's decision in *Ray vs. Atlantic Richfield Co.,*[51] as "[t]he leading case on the subject of field preemption of state statutes that regulate tankers." [52] The relevant issue addressed by *Ray* was a provision of Washington State law requiring that certain oil tankers satisfy certain design and safety standards or be required to use tug escorts while operating in Puget Sound. While the tug-escort provision was not found to be a design requirement under Title II to the PWSA, it was held to be "more akin to an operating rule [under Title I of the PWSA] . . . and, as such is a safety measure clearly with the reach of the Secretary's [of Transportation] authority under §§ 1221(3)(iii) and (iv) to establish 'vessel size and speed limitations and vessel operating conditions' and to restrict vessel operations to those with 'particular operating characteristics and capabilities.'"[53] The *Ray* decision goes on to observe that Title I of PWSA authorizes the Secretary to issue regulations to implement such provisions and that 22 U.S.C. §1222(b) prohibits States from issuing "higher safety equipment requirements or safety

[49]*See California v. ARC America Corp.*, 490 U.S. 93, 100-01 (1989); *Hines v. Davidowitz, supra.*,312 US 52 (1941).

[50]As noted by one commentator, "[n]othing in OPA90 or its legislative history and no authority cited by the court in Intertanko II, demonstrates a congressional intent to relieve the states of the preemptive effect of the IMO-sponsored marine safety or pollution prevention conventions." Allen, supra, note 41 at 132. Indeed, if it was not Congress' understanding that the states were generally preempted by federal statutes regulating maritime affairs, it would not have been necessary to reserve to the states a role in the liability and response aspects of marine pollution E.g. §1018,OPA90. For other commentaries on the general area, see, Robert H. Nicholas, Jr. *Federal and State Preemption Regarding Vessel Construction and Operation,* 73 Tulane Law Review 1 (1999); Charles L. Coleman, III, *Federal Preemption of State "BAP Laws; Repelling State Boarders in the Interest of Uniformity,* 9 U.S. F. Mar. L.J. 305 (1997).

[51] *Supra* note 6..

[52]*Intertanko, supra,* 148 F.3d at 1064.

[53]*Ray, supra,* 435 U.S. at 171.

standards," once the Secretary has issued regulations implementing the provision. As this Court held:

> The relevant inquiry under Title I with respect to the State's power to impose a tug-escort rule is thus whether the Secretary has either promulgated his own tug requirement for Puget Sound tanker navigation or has decided that no such requirement should be imposed at all.[54]

Noting that the Secretary had not issued any regulation leave subject, the Court held that the tug escort requirements promulgated by the State of Washington were not preempted.[55]

In this case, the Coast Guard has issued regulations pursuant to both Title I and Title II of the PWSA and under OPA90, dealing within the very activities sought to be regulated by Washington State. Under the *Ray* analysis, to the extent that the matters dealt with by the state regulations are within the purview of the authority granted to the Coast Guard under Title II, the state regulations should be preempted regardless of whether regulations have issued. To the extent that regulations are promulgated by the Coast Guard under Title I, such regulations would preempt any state regulations dealing with the same subject. Unless the federal government has relinquished its power to issue preemptive regulations regarding vessel operations and vessel safety with the passage of OPA90, the Washington statute and regulations must be found to have been preempted under the *Ray* decision. This would be the result even if the state regulations are considered not to be in direct conflict with their federal counterparts, but merely augmenting the federal regulations. An "overlap" between the scope of the state and federal regulations requires a finding that the state

[54]*Ray , supra,* 435 U.S. at 171-172

[55]The Court added:

> It may be that rules will be forthcoming that will preempt the State's present tug-escort rule, but until that occurs, the State's requirement need not give way under the Supremacy Clause.

Id. at 172.

regulations are preempted.[56]

CONCLUSION

If a governmental authority establishes a stricter standard than is required by existing law, the new stricter standard necessarily becomes the minimum standard for that jurisdiction. That is the crux of the problem raised by the decision in the *Intertanko* case. If the U.S. Coast Guard, acting pursuant to federal statute, imposes a stricter standard than that required by an international treaty, that standard becomes the minimum standard in the United States. If a state is able to impose a standard even stricter than imposed by the Coast Guard, the state standard becomes the minimum standard for the state.

If it is at all important that national standards dealing with maritime commerce are uniform, authority to impose stricter standards cannot be extended to the states or to their political subdivisions. The result would be chaos. With a degree of proliferation, in state regulation of vessel operation and management, a vessel meeting all of the requirements imposed by the United States under its statutes, regulations, and treaty obligations could be barred from calling at many American ports.

It is to avoid this kind of practical disruption of maritime commerce that the need for uniformity in maritime law is grounded. As worthy as is the cause of the environment, we must not be allowed to lose sight of the need for a nationally, *unified* approach to safety at sea and the prevention of pollution in the maritime environment. The need for uniformity in regulation of maritime commerce has not disappeared and perhaps is even more acute today as we attempt to deal with environmental threats that do not recognize either national or state boundaries.

The Petitions for Writ of Certiorari before the Court should be granted so that this Court can settle the extremely significant issues raised by this case concerning the roles of the federal government and the states in the regulation of maritime commerce.

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[56] *See Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 446 (1960).

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